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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

THOMAS E. HORTON,

Petitioner,

v.

UNION RECOVERY LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Appendix to Petition for Writ of Certiorari

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VIRGINIA SUPREME COURT

UNION RECOVERY LIMITED PARTNERSHIP,

Appellant,

v.

THOMAS E. HORTON, et al.

Appellees.

Record No. 960329

Appeal from the
Circuit Court of Fairfax County
M. Langhorne Keith, Judge

Entered: November 1, 1996

Present: all the Justices

Reversed and Remanded

OPINION BY JUSTICE L. KOONTZ, JR.:

In this appeal we consider whether an assignee of a promissory note from the Resolution Trust Corporation (RTC) is entitled to the benefit of the statute of limitations available under federal law to RTC as receiver of the insured

depository institution which originally held the note. Adhering to the common law rule that an assignee acquires the rights of the assignor, we hold that the federal statute controls the limitations period.

BACKGROUND

The facts of the case are not in dispute. On June 8, 1989, Thomas E. Horton executed a promissory note in favor of Federal Savings Bank of Virginia, F.S.B. (Federal) in the principal amount of $80,000. A variable rate of interest was payable monthly on the note from August 1, 1989, and the principal was due "ON DEMAND, BUT IF NO DEMAND IS MADE THEN ON JULY 1, 1990." Robert J. Leipzig executed a partial guaranty of the note in the amount of $20,000.

Sometime prior to April, 1992, Horton defaulted on the note and Leipzig defaulted on the guaranty. On April 10, 1992, RTC was appointed receiver for Federal and assumed control of its assets, including the note and guaranty at issue. On June 26, 1995, RTC assigned the note and guaranty to Union Recovery Limited Partnership (Union Recovery).

On August 30, 1995, Union Recovery filed a motion for judgment against Horton and Leipzig to recover on the note and guaranty. Within the motion for judgment, Union Recovery asserted the

applicability of the six-year statute of limitations afforded to RTC under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). 12 U.S.C. §1821(d)(14)(A)(i). Both Horton and Leipzig filed pleas in bar contesting the application of the federal limitations period and asserting that any action on the note was barred by the running of the five-year statute of limitations provided for under Code §8.01-246(2), which they alleged was the applicable state statute of limitations.

The parties filed briefs in support of their respective positions and presented argument to the trial court. By order entered November 17, 1995, the trial court sustained the pleas of the statute of limitations and dismissed the motion for judgment with prejudice.

Union Recovery filed a motion for reconsideration. In an opinion letter dated December 5, 1995 and adopted by reference in a subsequent order denying the motion for reconsideration, the trial court set forth the grounds for its decision. Citing WAMCO, III, Ltd. v. First Piedmont Mortgage Corp., 856 F.Supp. 1076 (E.D. Va. 1994), the trial court held that the statute of limitations provided for in FIRREA was a right applicable only for suits brought by government chartered corporations. As such, the trial court reasoned, the right was personal to RTC, and Union Recovery could acquire only those rights RTC had

under the note and guaranty instruments, not those which RTC had by virtue of its status as a receiver under FIRREA. We awarded Union Recovery an appeal.

APPLICATION OF STATE AND FEDERAL STATUTE OF LIMITATIONS PERIODS

Virginia Statute of Limitations

The note and its associated guaranty were executed in 1989 prior to the enactment of Title 8.3A, and, accordingly, this case is governed by the rules found in superseded Title 8.3. The parties have consistently treated the note as a pure demand note although it provided for a specific payment date if no demand was made. Under the provisions of Code §8.3A-108(c), absent a demand, a note of this type becomes payable at a definite time on the fixed date with the cause of action accruing on that date. Because the issue is not relevant to the ultimate determination of this appeal, we will assume, without deciding, that the parties have correctly applied the rules of superseded Title 8.3 in their treatment of the note as a pure demand note. Under former Code §8.3-122(1)(b), the cause of action on a pure demand note accrued upon its execution. Formerly, demand notes were subject to the five-year statute of limitations applicable to contracts generally. Code

§8.01-246(2).* Accordingly, Federal was required to sue on the note before June 8, 1994 to avoid an effective plea in bar of the statute of limitations.

Federal Statute of Limitations under FIRREA

FIRREA, Pub. L. No. 101-72, 103 Stat. 277 (1989)(codified in disconnected sections of Titles 12 and 15 of the U.S. Code), governs the procedures under which federally chartered corporations acting as agents of the United States become receivers or conservators of failed federally insured financial institutions. Its principal application is to the Federal Deposit Insurance Corporation (FDIC). However, when acting as receiver of an insured depository institution, RTC is deemed to be an agent of the United States. 12 U.S.C. §1441a(b)(1)(A). As such, RTC, as receiver, has the same rights and powers as does FDIC under FIRREA. 12 U.S.C. §1441a(b)(4)(A). Thus, although created for different purposes, RTC and FDIC are in all respects identically situated when acting as receivers in the name of the United States under FIRREA.

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*Title 8.3A now provides for a six-year statute of limitations on most forms of negotiable instruments. Code § 8.3A-118.

The relevant portions of FIRREA applicable to this appeal are found at 12 U.S.C. §1821(d)(14)(A) and (B):

> (A) In general.
>
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be--
>
> (i) in the case of any contract claim, the longer of--
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law;
>
> . . . .
>
> (B) Determination of the date on which a claim accrues.
>
> For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of--

(I) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

When RTC acquired the note and guaranty as receiver, it was entitled under FIRREA to institute actions on them under the longest period provided by the combined application of subsections A and B of 12 U.S.C. §1821(d)(14). Under the provisions of subsection B, RTC was permitted to advance the date of accrual of the causes of action to April 10, 1992, the date of its appointment as receiver. It was further permitted to take the six-year statute of limitations of subsection A over the five-year statute of limitations available under state law. Accordingly, RTC had until April 9, 1998 to sue upon the note and guaranty.

DISCUSSION

It is well established law in Virginia that an assignee obtains his rights from the assignor, and, thus, he is said to "stand in the shoes" of the assignor when pursuing an action on the contract or instrument assigned. See, e.g., National Bank and Trust Company at Charlottesville v. Castle, 196 Va. 686, 692-93, 85 S.E.2d 228, 232 (1955). Thus,

the sole question in this appeal is whether the statute of limitations contained in 12 U.S.C. §1821(d)(14)(A) and (B) applies to assignees of RTC, or do these assignees take their assignments subject only to the rights which would have accrued to the failed institution for which RTC is acting as receiver, thus becoming de facto assignees of the institution.

In Mountain States Financial Resources Corp. v. Agrawal, 777 F.Supp. 1550 (W.D. Okla. 1991), the first reported case to address the application of FIRREA's statute of limitations provisions to an assignee of an agent corporation of the United States, the court held that the federal statute of limitations applied to an assignee of FDIC. Id. at 1552. The court reasoned that:

> An assignee stands in the shoes of the assignor, and acquires all of the assignor's rights and liabilities in the assignment. This general principle and a strong public policy require that the FDIC's assignee acquire the six-year limitations period provided by §1821(d)(14)(A).

Id.

Several courts have relied on the reasoning in Mountain States to extend to

assignees of FDIC the six-year statute of limitations provided by 12 U.S.C §1821(d)(14)(A)(i). See, e.g., F.D.I.C. v. Bledsoe, 989 F.2d 805 (5th Cir. 1993); Remington Investments, Inc. v. Kadenacy, 930 F.Supp. 446 (C.D. Cal. 1996); White v. Moriarty, 19 Cal. Rptr. 2d 200 (Cal. Ct. App. 1993); Tivoli Ventures, Inc. v. Bumann, 870 P.2d 1244 (Colo. 1994); Cadle Co. II, Inc. v. Lewis, 864 P.2d 718 (Kan. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1613 (1994); Central States Resources Corp. v. First National Bank, 501 N.W.2d 271 (Neb. 1993). In addition, a recent decision of the Appellate Court of Illinois has applied this same reasoning to a suit brought by an assignee of RTC. Twenty First Century Recovery, Ltd. v. Mase, 665 N.E.2d 573 (Ill. Ct. App. 1996).

Disagreeing with the majority view, the court in WAMCO, the decision relied on by the trial court in this case, held that the five-year Virginia statute of limitations applied to a demand note assigned by RTC to WAMCO. WAMCO, 856 F.Supp. at 1088. In its analysis the court found that the statute plainly conferred the benefit of the six-year limitation on RTC in its status as receiver. As such, the court reasoned that the benefit is personal and, therefore, does not transfer to an assignee under existing common law rule. Id. at 1086. The court further found that public policy alone could not supply

the right where the statute was silent. Id.

We do not concur in the view expressed in WAMCO and adopt the view taken by the majority of other federal and state jurisdictions. We find that application of the common law, even without reference to the public policy this would promote, mandates the application of the longer limitations period. As expressed by the United States Court of Appeals for the Fifth Circuit in Bledsoe, we hold that where "statutes are absolutely silent on [a] matter[, i]t is an axiomatic principle of statutory construction that in effectuating Congress' intent courts are to fill the inevitable statutory gaps by reference to the principles of the common law." Bledsoe, 989 F.2d at 810.

The extended statute of limitations is merely a mechanism for providing the receiver with an adequate time to pursue those claims which the financial institution could not successfully pursue prior to its failure. As such, the receiver's right to sue within the statute of limitations period is inherent in its possession of the instruments at issue and would thus be among the "rights, remedies and benefits which are incidental to the thing assigned," WAMCO, 856 F.Supp. at 1086, and not merely a right "personal to the assignor and for [its] benefit only." Id. (citation omitted).

For these reasons, we will reverse the order of the trial court dismissing the motion for judgment and remand the case for further proceedings.

Reversed and remanded

Letter Opinion

Entered: December 4, 1995

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Re: Union Recovery L.P.
v. Horton, et al.
At Law No. 144826

Dear Counsel:

On November 17, 1995 the Court sustained Defendants' Pleas in Bar based on Virginia's five-year statute of limitations. On November 29, 1995 Plaintiff, Union Recovery Limited Partnership ("Union"), moved the Court to reconsider its decision. For the reasons set forth below, the Court declines to reconsider.

The issue in this case is whether the six-year statute of limitations provided for in 12 U.S.C. §1821 (d)(14) (the "RTC Statute") or the five-year statute of limitations set forth in Va. Code Ann. §8.01-246.2 (the "Virginia Statute"), controls in this suit on a note made by Defendant Horton and guaranteed by Defendant Leipzig. The Resolution Trust Corporation ("RTC") assigned the $80,000.00 note ("Note") to Union. The Note provides that it is payable "on demand, but if no demand is made then on July 1, 1990." Thus under applicable Virginia law, the statute of limitations began running on July 2, 1990. Va. Code Ann. §8.3-122(a).[1] Union filed its suit on August 30, 1995 and if the Virginia Statute applies, Union's lawsuit is barred.

The RTC Statute provides that "the applicable statute of limitations with regard to any action *brought by* the Corporation [FDIC] as conservator or receiver" (emphasis added), shall be the longer of six years beginning on the date the claim accrues or the limitations period applicable under state law. 12 U.S.C. §1821 (d)(14)(A)(i).[2] Moreover

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[1] Va. Code Ann. § 8.3A-118, editors note.

[2] When acting as a receiver the RTC is an agent of the United States and has the same rights and powers as the FDIC under 12 U.S.C. §§ 1821-1823. 12 U.S.C. § 1441a(b)(4)(A).

for purposes of the RTC Statute, a claim begins to run on the date the RTC is appointed as conservator or receiver or the date the cause of action accrues, whichever is later. 12 U.S.C. §1821 (d)(14)(B). The Note was payable to and held by the Federal Savings Bank of Virginia, FSB and the RTC was appointed the savings bank's receiver on April 10, 1992. Thus, the RTC would have until April 9, 1998 to bring an action on the Note and Union asserts that it "stands in the shoes" of the RTC.

The plain language of the RTC Statute applies only to actions brought by the RTC as a receiver and is silent on whether the statute applies to assignees of the RTC. Nonetheless, Union cites numerous cases wherein courts have filed in that statutory gap. Those cases hold that as an assignee stands in its assignors shoes, and public policy compels giving assignees the benefit of the RTC Statute of limitations,[3] such assignees are subject to the RTC Statute and not the applicable state limitations

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[3] The failure to allow private transferees to take advantage of the RTC Statute, courts find, would shrink the private market for the assets of failed banks and require the RTC to hold onto assets and prosecute actions itself. *F.D.I.C. v. Bledsoe, supra* at 811; *Fall v. Keasler*, 1991 WL 340182 at page 4 (N.D. Cal); *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1250 (Colo. 1994).

period. *F.D.I.C. v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993); *Mountain States Financial Resources Corp. v. Agrawal*, 777 F. Supp. 1550 (W.D. Oklahoma 1991); *Cadle Co. II, Inc. v. Stamm*, 633 So.2d 45 (Fla. Dist. Ct. App. 1994); *Cadle Co. II, Inc. v. Lewis*, 864 P.2d 718 (Kan. 1993), cert denied 114 S. Ct. 1613 (1994) and *Namm Portfolio, LLC v. Kilwaiths Associates II*, (Circ. Ct. for Arlington Co., April 21, 1995) (Kendrick, J.).

The defendants rely on *Wamco, III, Ltd. v. First Piedmont Mortg. Corp.*, 856 F. Supp. 1076 (E.D. Va. 1994) which held, on facts similar to the case at bar, that Virginia's five-year statute applied. The *Wamco* decision was based on 1) the plain language of the RTC Statute, 2) the law of assignments (which the Wamco court found *Bledsoe* and other decisions had misconstrued), and 3) Va. Code. Ann. §8.3-201(1) which provided that "transfer of an instrument vests in the transferee such rights as the transferee has therein....". Citing Hawkland & Lawrence UCC Series §3-201:02, *Wamco* held that this language meant such rights as the transferor had in the instrument and not the status of the transferor, *id* at 1087.

Union argues that the UCC leg of *Wamco* has been sawn off by the January 1, 1993 changes to Article 3 of the UCC.[4]

---

[4] The note in *Wamco* was transferred in 1992 so this change was inapplicable. *Wamco, supra*, at 1087.

Va. Code. Ann. §8.3A-203 now provides that the transfer of an instrument "vests in the transferee any right of the transferor to enforce the instrument". Union asserts that one of those rights was the RTC's "right" to rely on the six-year limitations period and thus Union enjoys that right as the RTC's assignee. But the official comment to §8.3A-203 makes it clear that the change from former §8.3-201 was not intended to change the substantive law of what rights are transferable by an assignor but rather to clarify what rights a transferee can receive as a result of such transfer. Va. Code Ann. §8.3A-203, *Official Comment* at 1. In addition, even if this Court accepts Union's reading of §8.3A-203,[5] such a reading would not undermine the fundamental underpinning of *Wamco*, that is, that *Bledsoe* and similar cases ignore the plain language of the RTC Statute:

> It is no doubt true that there are valid policy reasons which can be advanced for interpreting the statute in another fashion. However, that

---

[5] Under Union's theory of the case the latest this action could have accrued is April 10, 1992 and new Article 3A of Virginia's UCC was not applicable to actions accruing before January 1, 1993.

> is a matter for the legislature, not for the courts, and where, as here, Congress has spoken plainly to confer a benefit on a particular entity functioning in a particular status, it is not for the courts to assess the various policy considerations which would support having the statute to provide otherwise.

Wamco, supra, at 1087-88.

Finally, the bald assertion that somehow a statute of limitations creates a "right" to bring an action does not bear analysis. A statute of limitation neither creates nor destroys the right of a holder of an instrument, it bars only the remedy. *School Bd. of the City of Norfolk v. U.S. Gypsum,* 234 Va. 32, 37 (1987).

For the foregoing reasons the Court concluded that Defendants' Plea in Bar was well taken and I decline to reconsider my ruling.

An order will be entered reflecting the above decision.

Very truly yours,

/s/ M. Langhorne Keith

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS E. HORTON, et al.,

Defendants.

Entered: December 5, 1995

ORDER

On November 29, 1995 Plaintiff, Union Recovery Limited Partnership, moved the Court to reconsider its decision sustaining defendant's Plea of the Statute of Limitations. For the reasons set forth in the Court's opinion of December 4, 1995 the Court declines to reconsider.

/s/ M. Langhorne Keith, Judge

Endorsement of counsel is waived pursuant to Rule 1:13.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS E. HORTON, et al.,

Defendants.

Entered: November 17, 1995

ORDER

Upon consideration of the arguments of counsel, and the briefs submitted by the respective parties in this matter, it is this 17th day of November, 1995, by the Circuit Court for the County of Fairfax, Virginia,

ORDERED, ADJUDGED AND DECREED that the respective pleas of of the statute of limitations of Defendants Thomas E. Horton and Robert J. Leipzig are sustained and the Motion for Judgment is, hereby, dismissed with prejudice.

/s/ Circuit Court Judge
County of Fairfax

WE ASK FOR THIS:

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS E. HORTON, et al.,

Defendants.

Filed: January 30, 1996

WRITTEN STATEMENT OF FACTS
AND OTHER INCIDENTS OF
THE CASE PURSUANT TO RULE 5:11

Plaintiff, Union Recovery Limited Partnership ("Union"), filed a Motion for Judgment on August 30, 1995, stating a single count against Defendant Thomas E. Horton ("Horton") and an additional count against Defendant Robert J. Leipzig ("Leipzig"). The count against Defendant Horton sought to recover principal and interest allegedly due on a demand note dated June 8, 1989. The demand note was executed in connection with a loan made by Federal Savings Bank of Virginia, F.S.B., to Defendant Horton. The demand note, on its face, provided that the

principal is due "ON DEMAND, BUT IF NO DEMAND IS MADE THEN ON JULY 1, 1990." A copy of the demand note was attached as an exhibit to the Motion for Judgment. The count against Defendant Leipzig sought to recover $20,000 on an alleged guaranty of the demand note, executed contemporaneously with the demand note. A copy of the guaranty was attached as an exhibit to the Motion for Judgment.

According to the Motion for Judgment, "[t]he Resolution Trust Corporation ('RTC') ... acquired all right, title and interest in the Note ... when it was appointed Receiver for the Federal Savings Bank of Virginia, F.S.B., on or about April 10, 1992." Pl. Mot. For Judg., ¶13. The Motion for Judgment stated further that "[t]he RTC, as Receiver for the Federal Savings Bank of Virginia, F.S.B., has assigned all right, title, and interest in the Note and Guaranty to plaintiff Union." Pl. Mot. for Judg., ¶14. The demand note, attached to the Motion for Judgment, indicated that the assignment by the RTC to Plaintiff occurred on June 26, 1995. Plaintiff alleged in its Motion for Judgment that under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 "FIRREA"), 12 U.S.C. § 1821(d)(14), and related case law, Plaintiff had six years from the date the RTC was appointed receiver for Federal Savings Bank of Virginia or six years from the date its cause of action

accrued whichever is later, to bring its action. Pl. Mot. For Judg., ¶15.

This action was filed on August 30, 1995. Defendants responded to the Motion for Judgment on October 19, 1995, by filing their respective pleas of the statute of limitations. Defendants argued that the action was time-barred under Virginia law. Defendants contended that the five-year statute of limitations applicable to written contracts governed this action and that Plaintiff's action on the demand note and guaranty accrued upon execution of the demand note. According to Defendants, the period for bringing this action expired on June 8, 1994. Defendants further argued that the six-year limitation period under FIRREA, upon which Plaintiff relied, applies only to the Resolution Trust Corporation ("RTC") suing in its capacity as receiver for a failed financial institution, and not to assignees of the RTC.

The parties filed briefs on the issues raised by the respective pleas of the statute of limitations. Oral argument was heard on November 18, 1995. Upon consideration of the briefs and oral argument presented by the parties, the Court sustained Defendants' pleas of the statute of limitations on November 17, 1995. Plaintiff filed a Motion for Reconsideration on November 29, 1995, arguing that recent amendments to the Uniform Commercial Code, as adopted in Virginia, supported its contention that

the FIRREA statute of limitations governed this action. On December 4, 1995, the Court issued a written opinion, which set forth the rationale underlying the Court's decisions to sustain Defendants' pleas and denied Plaintiff's motion for reconsideration. The Court's written opinion and the remainder of the record in this case are incorporated herein by reference. For purposes of the Court's ruling on the pleas of the statute of limitation, no evidentiary hearing was necessary and the factual basis for the Court's ruling are the facts alleged in the pleadings and papers filed on behalf of the respective parties.

/s/ M. Langhorne Keith
Circuit Court Judge

Dated: January 30, 1996

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP
by UNION FINANCIAL CORPORATION,
Its General Partner,
888 Sixteenth Street, N.W., Suite 700
Washington, D.C. 20006,

Plaintiff,

v.

THOMAS E. HORTON
20 Maplewood Park Court
Bethesda, Maryland 20814-1731,

and

ROBERT J. LEIPZIG
10114 Walker Woods Drive
Great Falls, Virginia 22066-3611,

Defendants.

Filed: August 30, 1995

MOTION FOR JUDGMENT

Plaintiff Union Recovery Limited Partnership ("Union"), by undersigned counsel, for its Motion for Judgment

against the defendants alleges as follows:

PARTIES

1. The plaintiff, Union, is a limited partnership organized and existing under the laws of the State of Maryland. Its General Partner, Union Financial Corporation, is a Maryland Corporation.

2. Defendant Thomas E. Horton ("Horton"), resides at 20 Maplewood Park Court, Bethesda, Maryland 20814. He entered into the loan which is the subject of this litigation with Federal Savings Bank of Virginia, F.S.B., in Fairfax County, Virginia.

3. Defendant Robert J. Leipzig ("Leipzig") is a citizen of the Commonwealth of Virginia residing at 10114 Walker Woods Drive, Great Falls, Virginia 22066. He guaranteed a portion of the loan which is the subject of this litigation in Fairfax County, Virginia.

JURISDICTION AND VENUE

4. The Court has jurisdiction over all resident parties and over all nonresident parties pursuant to Va. Code Ann. § 8.01-328.1 (Michie 1992).

5. Venue is proper in Fairfax County pursuant to Va. Code Ann. § 8.01-262 (Michie 1992).

FACTUAL BACKGROUND

6. In June of 1989, the Federal Savings Bank of Virginia, F.S.B., 200 Little Falls Street, Falls Church, Virginia 22046, extended to defendant Horton a loan in the principal amount of $80,000, as evidenced by a promissory note dated June 8, 1989 (the "Note") (a true copy of which is attached hereto as Exhibit A and incorporated fully herein). The Note provided that the principal was due on demand or on July 1, 1990 if no demand was made.

7. The Note provided that defendant Horton was to pay interest at a variable rate, and that accrued interest was due on demand, or monthly beginning August 1, 1989 if no demand was made.

8. The Note also provided that defendant Horton would be obligated to pay attorney's fees and court costs in the event a lawyer were hired to collect the Note.

9. In June of 1989, defendant Leipzig "absolutely and unconditionally guarantee[d] to the Bank the full and prompt payment when due . . . of each and every debt, liability and obligation of every type and description which [defendant Horton] may now or at any time hereafter owe to [Federal Savings Bank of Virginia, F.S.B.] . . . . ," as evidenced by a guaranty dated June 8, 1989 (the "Guaranty") (a true copy of which is attached hereto as Exhibit B and

incorporated fully herein). The liability of defendant Leipzig under the Guaranty, however, was limited to the principal amount of $20,000, plus accrued interest thereon and all attorney's fees and other collection costs.

10. Under the terms of the Note and Guaranty, defendants Horton and Leipzig waived presentment, demand, protest, and notice of dishonor.

11. Defendant Horton has not made all of the required payments of principal and interest under the Note and is presently in default of his obligations under the Note.

12. Defendant Leipzig has not made any payments to satisfy Horton's indebtedness under the Note and is presently in default of his obligations under the Guaranty.

13. The Resolution Trust Corporation ("RTC") subsequently acquired all right, title, and interest in the Note and Guaranty, when it was appointed Receiver for the Federal Savings Bank of Virginia, F.S.B., on or about April 10, 1992.

14. The RTC, as Receiver for Federal Savings Bank of Virginia, F.S.B., has assigned all right, title, and interest in the Note and Guaranty to plaintiff Union.

15. Under the Financial Institutions, Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. §1821(d)(14), and related case law, Union

has six years from the date the RTC was appointed receiver for Federal Savings Bank of Virginia, F.S.B., or six years from the date its cause of action accrued, whichever is later, to bring the instant case of action.

COUNT I -- THE HORTON NOTE

16. Plaintiff restates and incorporates by reference the allegations contained in the preceding paragraphs.

17. As of August 25, 1995, the amount due from defendant Horton under the Note is $80,000 in principal, plus $21,705.21 in interest, plus attorney's fees in the amount of $8,000 plus court costs.

18. In addition to the foregoing, attached hereto as Exhibit C is the Affidavit of William B. Buland, Director of Asset Management of Union. The Affidavit of Mr. Buland confirms the accuracy of the foregoing facts, the authenticity of the Note and the amount owed pursuant to the Note. Accordingly, pursuant to Virginia Code §8.01-28, Union is entitled to immediate judgment against defendant Horton, without the need for further evidence, unless defendant Horton appears (or files an answer) and denies under oath the accuracy of the foregoing and denies that Union is entitled to the requested relief.

WHEREFORE, Plaintiff Union respectfully requests that this Court

enter judgment in favor of Union and against defendant Horton in the amount of $80,000 in principal, accrued interest as of August 25, 1995 in the amount of $21,705.21, and attorney's fees in the amount of $8,000, for a total of $109,705.21 plus additional interest through judgment, court costs and post-judgment interest; and grant such other relief as may be appropriate.

COUNT II -- THE LEIPZIG GUARANTY

19. Plaintiff restates and incorporates by reference the allegations contained in the preceding paragraphs.

20. As of August 25, 1995, the amount due from defendant Leipzig under the Guaranty was $20,000 in principal, plus $5,426.30 in interest, plus attorney's fees in the amount of $8,000 plus court costs.

21. In addition to the foregoing, also attached hereto as Exhibit C is the Affidavit of William B. Buland, Director of Asset Management of Union. The Affidavit of Mr. Buland confirms the accuracy of the foregoing facts, the authenticity of the Note and Guaranty and the amount owed pursuant to the Note and Guaranty. Accordingly, pursuant to Virginia Code §8.01-28, Union is entitled to immediate judgment against defendant Leipzig without the need for further evidence, unless defendant Leipzig appears (or files an answer) and denies

under oath the accuracy of the foregoing and denies that Union is entitled to the requested relief.

WHEREFORE, Plaintiff Union respectfully requests that this Court enter judgment in favor of Union and against defendant Leipzig in the amount of $20,000 in principal, accrued interest as of August 25, 1995 in the amount of $5,426.30, attorney's fees in the amount of $8,000, for a total of $33,426.30 plus additional interest through judgment, court costs and post-judgment interest; and grant such other relief as may be appropriate.

Respectfully submitted,

WILLIAMS & CONNOLLY
By: /s/ Robert M. Cary

Robert M. Cary, #32000
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Counsel for Plaintiff
Union Recovery Limited
Partnership

August 30, 1995

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP
by UNION FINANCIAL CORPORATION,
Its General Partner,
888 Sixteenth Street, N.W., Suite 700
Washington, D.C. 20006,

Plaintiff,

v.

THOMAS E. HORTON
20 Maplewood Park Court
Bethesda, Maryland 20814-1731,

and

ROBERT J. LEIPZIG
10114 Walker Woods Drive
Great Falls, Virginia 22066-3611,

Defendants.

Filed: August 30, 1995

AFFIDAVIT OF WILLIAM B. BULAND

I, WILLIAM B. BULAND, being duly sworn according to law, upon my oath, depose and say:

1. I am currently employed by Plaintiff Union Recovery Limited Partnership ("Union"), as its Director of Asset Management.

2. I have fully reviewed Union's Motion for Judgment. The facts set forth in Union's Motion for Judgment are accurate, and I hereby confirm the accuracy of the facts set forth therein.

3. I have also reviewed the Note attached to Union's Motion for Judgment as Exhibit A (the "Note") and the Guaranty (the "Guaranty") attached to Union's Motion for Judgment as Exhibit B and hereby confirm that they are authentic.

4. I also attest that the Note and Guaranty have been maintained by Union in the normal course of its business, that I am familiar with such business procedures and have personal knowledge as to the manner in which these particular documents have been maintained.

5. As of August 25, 1995, defendant Horton has paid no portion of the indebtedness stated in Union's Motion for Judgment, which totals $109,705.21 as of August 25, 1995, plus interest through judgment and court costs.

6. As of August 25,1995, defendant Leipzig has paid no portion of the indebtedness stated in the Motion for Judgment, which totals $33,426.30 as of August 25, 1995 plus interest through judgment and court costs.

I do solemnly declare and affirm under the penalties of perjury that the matters and facts as stated above are true and correct to the best of my knowledge, information and belief.

/s/ William B. Buland

Sworn to and subscribed before me this 30th day of August, 1995.

/s/ NOTARY PUBLIC

My Commission Expires: April 30, 1998

THOMAS E. HORTON
10649 Weymouth Street, #204
Bethesda, MD 20814
BORROWER'S NAME AND ADDRESS
"I" includes each borrower above, jointly and severally.

FEDERAL SAVINGS BANK OF VIRGINIA, FSB
200 LITTLE FALLS STREET
FALLS CHURCH, VA 22046
LENDER'S NAME AND ADDRESS
"You" means the lender, it successors and assigns.

Loan Number: 60-26
Date: June 8, 1989
Maturity Date: July 1, 1990
Loan Amount: $80,000.00
Renewal Of: _____

I promise to pay to you or your order at your address listed above the PRINCIPAL sum of EIGHTY THOUSAND AND NO/100 Dollars ($80,000.00)

☒ Single Advance: I have received all of this principal sum. No additional advances are contemplated under this note.

PURPOSE: The purpose of this loan is CONSUMER: PURCHASE INTO DENTAL PRACTICE.

INTEREST: I agree to pay interest (calculated on a ACTUAL/365 basis) on the

principal balance(s) owing from time to time as stated below.

☒ Variable Rate: I agree to pay interest at the initial simple rate of 13.000% per year. This rate may change as stated below.

☒ Index Rate: The future rate will be 2.000% over the following index rate: NEW YORK PRIME AS QUOTED WITHIN THE WALL STREET JOURNAL.

☒ Frequency and Timing: The rate on this note may increase as often as THE PRIME RATE CHANGES. An increase in the interest rate will take effect ON THE SAME DAY.

☒ Limitations: The rate on this note will not at any time (and no matter what happens to any index rate used) go above or below these limits:

☒ Maximum Rate: The rate will not go above N/A.

☒ Minimum Rate: The rate will not go below 9.50%.

Post-Maturity Rate: I agree to pay interest on the unpaid balance owing after maturity, and until paid in full, as stated below:

☒ on the same fixed or variable rate basis in effect before maturity (as indicated above).

PAYMENTS: I agree to pay this note as follows:

☒ Interest: I agree to pay accrued interest ON DEMAND. BUT IF NO DEMAND IS MADE MONTHLY BEGINNING AUGUST 1, 1989.

☒ Principal: I agree to pay the principal ON DEMAND. BUT IF NO DEMAND IS MADE THEN ON JULY 1, 1990.

☒ Effect of Variable Rate: An increase in the interest rate will have the following effect on the payments:

☒ The amount of each scheduled payment will be increased.

☒ The amount of the final payment will be increased.

CONFESSION OF JUDGMENT: I appoint and authorize DANIEL W. HUMBERT attorneys in

fact to, if I default on this note, appear in the office of CLERK OF CIRCUIT COURT, ARLINGTON COUNTY, VA., and confess judgment against me in the amount of any unpaid principal and interest, and costs of collection as provided in this note. SEE REVERSE SIDE FOR ADDITIONAL TERMS OF CONFESSION OF JUDGMENT.

☒ If checked, no agreement was signed today securing this note. (This section is for your internal use. It may not include every agreement or item of collateral securing this note. You will not lose any security by omitting it from this section.)

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE (INCLUDING THOSE ON THE OTHER SIDE). I have received a copy on today's date.

/s/ Thomas E. Horton

ADDITIONAL TERMS

APPLICABLE LAW: The law of the state of Virginia will govern this note. Any term of this note which is contrary to applicable law will not be effective, unless the law permits you and me to agree to such a variation.

PAYMENTS: Each payment I make on this note will first reduce the amount I owe you for charges which are neither

interest nor principal. The remainder of each payment will then reduce unpaid earned interest, and then unpaid principal. If you and I agree to a different application of payments, we will describe our agreement on this form.

INTEREST: If I receive the principal in more than one advance, each advance will start to earn interest only when I receive the advance. The interest rate in effect on this note at any given time will apply to the entire principal advanced at that time. If the interest rate on this note is variable, decreases in the interest rate will have the corresponding opposite effect on my payment that increases will have (as shown on the front of this form). No matter how the interest rate is computed, it will never be higher than the highest rate allowed by law.

INDEX RATES: If you and I have agreed that the interest rate on this note will be variable and will be related to an index rate, then the index we select will function only as a tool for setting the rate on this note. You do not guarantee, by selecting any index, that the rate on this note will have a particular relationship to the rate you charge on any other loans or any type or class of loans with your other customers.

SINGLE ADVANCE LOANS: If this is a single advance loan, you and I expect that you will make only one advance of principal. However, you may add other amounts to the principal if you make any payments described in the "PAYMENTS BY LENDER" paragraph below.

MULTIPLE ADVANCE LOANS: If this is a multiple advance loan, you and I expect that you will make more than one advance of principal.

If this is closed end credit, then repaying a part of the principal will not entitle me to additional credit.

If this is open end credit, then repaying a part of the principal will entitle me to additional credit, unless the open end feature has expired. You will not ordinarily make an advance if it would cause the unpaid principal amount to become greater then the maximum principal amount, or if the unpaid principal amount is already greater than the maximum principal amount. You will never be obligated to make such an advance, even if you occasionally do so.

PAYMENTS BY LENDER: If you are authorized to pay, on my behalf, charges I am obligated to pay (such as property insurance premiums), then you may treat those payments as advances and add them to the unpaid principal under this note.

POST-MATURITY RATE: For purposes of deciding when the "Post-Maturity Rate" (shown on the other side) applies, the term "maturity" means the following:

(1) if the note is payable on demand, the date you make your demand;
(2) if the note is payable on demand with an alternate maturity date(s), the date you make your demand or the final alternate maturity date or the date you accelerate payment on the note, whichever is earlier; and
(3) in all other cases, the date of the last scheduled payment of principal or the date you accelerate payment on the note, whichever is earlier.

SET-OFF: You have the right to set-off any amount I owe you under this note against any right I have to receive money from you. If my right to receive money from you is owned by someone else not paying this note, your set-off can only reach funds I could have reached with my own request or endorsement. Your right of set-off does not extend to accounts where my rights are only as a fiduciary. It also does not extend to my IRA or other tax-deferred retirement account.

Your right of set-off applies without your first telling me you are going to use it. It applies no matter

what sort or value of collateral is on this loan. It also applies no matter who else has agreed to pay this note.

You will not be liable for wrongful dishonor of a check where such dishonor occurs because you set-off this debt against my account.

COSTS OF COLLECTION: If you must hire a lawyer to collect this note, I must pay his or her fee, plus court costs (except where prohibited by law).

DEFAULT: I will be in default if any one or more of the following occur:

(1) I fail to make a payment on time or in the amount due.
(2) I fail to keep the collateral insured, if required.
(3) I fail to keep any other promise I have made in connection with this loan.
(4) I fail to pay, or keep any other promise, on any other loan or agreement I have with you.
(5) Any other creditor of mine attempts to collect the debt I owe him through court proceedings.
(6) I die.
(7) I go into bankruptcy, whether by my own choice or not.
(8) I do or fail to do something which causes you to believe that you will have difficulty collecting the amount I owe you.

(9) Anything else happens which causes you to believe that you will have difficulty collecting the amount I owe you.

REMEDIES: If I am in default on this note, you have the following remedies:

(1) You may demand immediate payment of all I owe you under this note.

(2) You may set-off this debt against any right I have to the payment of money from you.

(3) You may demand more security or new parties obligated to pay this note in return for not using any other remedy.

(4) You may make use of any remedy you have under state or federal law.

(5) You may make use of any remedy given to you in any agreement securing this note.

(6) If this is a multiple advance loan, either open end or closed end, you may refuse to make advances to me while I am in default.

By selecting any one or more of these remedies you do not give up your right to later use any other remedy. By deciding not to use any remedy should I default, you do not waive your right to later consider the event a default if it happens again.

CONFESSION OF JUDGMENT AND WAIVER OF EXEMPTION: I authorize the attorneys in fact named on the front side of this form in the event of my default to obtain judgment against me for any unpaid balance of principal and interest, and for costs of collection. I agree that this judgment will be entered without any service of process on me or any other notice to me prior to entry. I waive the benefit of all homestead and other exemptions and I agree that the judgment shall be a lien on my principal residence immediately upon confession. This power of attorney shall not terminate upon my disability.

WAIVER: I give up my rights to require you to do certain things. I will not require you to:

(1) demand payment of amounts due (presentment);
(2) obtain official certification of nonpayment (protest);
(3) give notice that amounts due have not been paid (notice of dishonor).

SECURITY: The portion of this form identifying agreements securing this note is for your internal reference only. The fact that you do not list an agreement in that portion of the form does not mean that the agreement does not secure this note.

ADDITIONAL PARTIES AND SECURITY: I understand that I must pay this note even if someone else has signed it. You may sue me, or anyone else, or any of us together, to collect this note. You do not have to tell me this note has not been paid. You may release any cosigner and I will still be obligated to pay the note. If you give up any of your rights it will not affect my duty to pay this note. Extending new credit or renewing this note will not affect my duty to pay this note.

FINANCIAL STATEMENTS: I agree to provide to you, upon request, any financial statements or information you may deem necessary. I warrant that all financial statements and information I provide to you are or will be accurate, correct, and complete.

GUARANTEE: By signing below, I unconditionally guarantee the payment of any amounts owed under this note. I also agree that all the other terms of the note will apply to me.

X_____

Pay to the order of Union Recovery Limited Partnership WITHOUT RECOURSE, REPRESENTATION OR WARRANTY

RESOLUTION TRUST CORPORATION as Receiver of Federal Savings Association of Virginia

By: /s/ Karen B. Zale
Title: Attorney In Fact
Date: 6-26-95

GUARANTY

FALLS CHURCH, VA
June 8, 1989

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and to induce FEDERAL SAVINGS BANK OF VIRGINIA, FSB (herein, with its participants, successors and assigns, called "Bank"), at its option, at any time or from time to time to make loans or extend other accommodations to or for the account of THOMAS E. HORTON (herein called "Borrower") or to engage in any other transactions with Borrower, the undersigned hereby absolutely and unconditionally guarantee(s) to the Bank the full and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of the debts, liabilities and obligations described as follows.

A. If this ☒ is checked, the undersigned guarantee(s) to Bank the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Bank (whether such debt, liability or obligation now exists or is

hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several or joint and several, all such debts, liabilities and obligations being hereinafter collectively referred to as the "indebtedness").

The undersigned further acknowledge(s) and agree(s) with Bank that:

1. No act or thing need occur to establish the liability of the undersigned hereunder, and no act or thing except full payment and discharge of all indebtedness, shall in any way exonerate the undersigned or modify, limit or release the liability of the undersigned hereunder.

2. If paragraph A is checked, this is an absolute, unconditional and continuing guaranty of payment of the indebtedness and shall continue to be in force and be binding upon the undersigned, whether or not all indebtedness is paid in full, until this guaranty is revoked prospectively as to future transactions, by written notice actually received by the Bank, and such revocation shall not be effective as to

indebtedness existing or committed for at the time of actual receipt of such notice by the Bank, or as to any renewals, extensions and refinancings thereof, if there be more than one undersigned, such revocation shall be effective only as to the one so revoking. The death or incompetence of the undersigned shall not revoke this guaranty, except upon actual receipt of written notice thereof by the Bank and then only as to the decedent or the incompetent and only prospectively, as to future transactions, as herein set forth.

3. If the undersigned shall be dissolved, shall die, or shall be or become insolvent (however defined) then the Bank shall have the right to declare immediately due and payable, and the undersigned will forthwith pay to the Bank, the full amount of all indebtedness, whether due and payable or unmatured. If the undersigned voluntarily commences or there is commenced involuntarily against the undersigned a case under the United States Bankruptcy Code, the full amount of all indebtedness, whether due and payable or unmatured, shall be immediately due and payable without demand or notice thereof.

4. The liability of the undersigned hereunder shall be limited to a principal amount of $20,000.00 (if unlimited or if no amount is stated, the undersigned shall be liable for all

indebtedness, without any limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto. Indebtedness may be created and continued in any amount, whether or not in excess of such principal amount, without affecting or impairing the liability of the undersigned hereunder. The Bank may apply any sums received by or available to the Bank on account of the indebtedness from Borrower or any other person (except the undersigned), from their properties, out of any collateral, security or from any other source in payment made by the undersigned unless the guaranty shall be effective to reduce or discharge such liability only if accompanied by a written transmittal document, received by the Bank, advising the Bank that such payment is made under this guaranty for such purpose.

5. The undersigned will not exercise or enforce any right of contribution, reimbursement, recourse or subrogation available to the undersigned against any person liable to payment of the indebtedness, or as to any collateral security therefor, unless and until all of the indebtedness shall have been fully paid and discharged.

6. The undersigned will pay or reimburse the Bank for all costs and expenses (including reasonable attorneys' fees and legal expense) incurred by the Bank in connection with the protection,

defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

This guaranty includes the additional provisions on the reverse side hereof, all of which are made a part hereof.

This guaranty is ☒ unsecured.

IN WITNESS WHEREOF, this guaranty has been duly executed by the undersigned the day and year first above written.

/s/ Robert J. Leipzig

ADDITIONAL PROVISIONS

7. Whether or not any existing relationship between the undersigned and Borrower has been changed or ended and whether or not this guaranty has been revoked, the Bank may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of indebtedness, without any consent or approval by the undersigned and without any notice to the undersigned. The liability of the undersigned shall not be affected or impaired by any of the following acts or things (which the Bank is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the

undersigned): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all indebtedness; (ii) any one or more extensions or renewals of indebtedness (whether or not for longer than the original period) or any modification of the interest rates, maturities or other contractual forms applicable to any indebtedness; (iii) any waiver or indulgence granted to Borrower, any delay or lack of diligence in the enforcement of indebtedness, or any failure to institute proceedings, file a claim, give any required notices or otherwise protect any indebtedness; (iv) any full or partial release of, settlement with, or agreement not to sue, Borrower or any other guarantor or other person liable in respect of any indebtedness; (v) any discharge of any evidence of indebtedness or the acceptance of any instrument in renewal thereof or substitution therefor; (vi) any failure to obtain collateral security (including rights of setoff) for indebtedness, or to see to the proper or sufficient creation and perfection thereof, or to establish the priority thereof, or to protect, insure, or enforce any collateral security, or any modification, substitution, discharge, impairment, or loss of any collateral security; (vii) any foreclosure or enforcement of any collateral security; (viii) any transfer of any indebtedness or any evidence thereof; (ix) any order

of application of any payments or credits upon indebtedness; (x) any election by the Bank under § 1111(b)(2) of the United States Bankruptcy Code.

8. The undersigned waive(s) any and all defenses, claims and discharges of Borrower, or any other obligor, pertaining to indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the undersigned will not assert, plead or enforce against the Bank any defense of waiver, release, discharge in bankruptcy, statute of limitations, res judicata, statute of frauds, anti-deficiency statute, fraud, incapacity, minority, usury, illegality or unenforceability which may be available to the Borrower or any other person, liable in respect of any indebtedness, or any setoff available against the Bank to Borrower or any other person, whether or not on account of a related transaction. The undersigned expressly agree(s) that the undersigned shall be and remain liable for any deficiency remaining after foreclosure of any mortgage or security interest securing indebtedness, whether or not the liability of Borrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision.

9. The undersigned waive(s) presentment, demand for payment, notice of dishonor or nonpayment, and protest of any instrument evidencing indebtedness.

The Bank shall not be required first to resort for payment of the indebtedness to Borrower or other persons or their properties, or first to enforce, realize upon or exhaust any collateral security for indebtedness, before enforcing this guaranty.

10. If any payment applied by the Bank to indebtedness is thereafter set aside, recovered, rescinded or required to be returned for any reason (including, without limitation, the bankruptcy, insolvency or reorganization of Borrower or any other obligor), the indebtedness to which such payment was applied shall for the purposes of this guaranty be deemed to have continued in existence, notwithstanding such application, and this guaranty shall be enforceable as to such indebtedness as fully as if such application has never been made.

11. The liability of the undersigned under this guaranty is in addition to and shall be cumulative with all other liabilities of the undersigned to the Bank as guarantor or otherwise, without any limitation as to amount, unless the instrument or agreement evidencing or creating such other liability specifically provides to the contrary.

12. This guaranty shall be enforceable against each person signing this guaranty, even if only one person signs and regardless of any failure of other persons to sign this guaranty. If

there be more than one signer, all agreements and promises herein shall be construed to be, and are hereby declared to be, joint and several in each and every particular and shall be fully binding upon and enforceable against either, any or all the undersigned. This guaranty shall be effective upon delivery to the Bank, without further act, condition or acceptance by the Bank, shall be binding upon the undersigned and the heirs, representatives, successors and assigns of the undersigned and shall inure to the benefit of the Bank and its participants, successors and assigns. Any invalidity or unenforceability of any provision or application of this guaranty shall not affect other lawful provisions and application hereof, and to this end the provisions of this guaranty are declared to be severable. This guaranty may not be waived, modified, amended, terminated, released or otherwise changed except by a writing signed by the undersigned and the Bank. This guaranty shall be governed by the laws of the State in which it is executed. The undersigned waive(s) notice of the Bank's acceptance hereof and waive(s) the right to a trial by jury in any action based on or pertaining to this guaranty.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

At Law No. 144826

UNION RECOVERY LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS E. HORTON, et al.,

Defendants.

Filed: August 30, 1995

PLEA OF THE STATUTE OF LIMITATIONS

COMES NOW Defendant, Thomas E. Horton, by counsel, and files this plea in bar of the Motion for Judgment filed against Defendant in the above-styled action. In support of his plea of the statute of limitations, Defendant states the following:

1. Plaintiff, Union Recovery Limited Partnership ("Union"), states a single count against Defendant, seeking recovery on a demand note allegedly executed on or about June 8, 1989. Motion for Judgment, ¶¶6, 16-19.

2. Under Virginia law, a cause of action to recover on a demand note

accrues on the date the note is executed. See, e.g., Guth v. Hamlet Associates, Inc., 230 Va. 64, 334 S.E.2d 558 (1985).

3. The applicable period within which to bring a cause of action for recovery on a demand note is five years. Va. Code §8.01-246.

4. The limitation period for bringing an action on the demand note at issue in this action expired on June 8, 1994.

5. This action by Plaintiff on the demand note was filed on August 30, 1995, more than a year after the applicable limitation period had expired.

6. In an effort to avoid the consequences of the unreasonable delay in enforcing the demand note, Plaintiff seeks to invoke a six-year limitation period under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. §1821 (d)(14). Motion for Judgment, ¶15. By the plain language of the statute upon which Plaintiff relies, the six-year limitation period applies only to the Resolution Trust Corporation ("RTC") suing in its capacity as receiver for a failed financial institution. 12 U.S.C. §1821(d)(14)(A) ("Notwithstanding any provision of the contract, the applicable statute of limitations with regard to any action by the [RTC] as conservator or receiver shall be.....") (emphasis added).

7. Plaintiff is neither the Resolution Trust Corporation nor the "receiver" as specified in 12 U.S.C. §1821(d)(14) and, therefore, the statute does not apply to Plaintiff.

8. Plaintiff has alleged that it obtained right, title and interest in the demand note as an assignee of the RTC Motion for Judgment, ¶14. Under controlling federal case law in this jurisdiction, the six-year limitation period under 12 U.S.C. §1821(d)(14) does not inure to the benefit of assignees of the RTC. WAMCO, III, Ltd. v. First Piedmont Mtg. Corp., 856 F. Supp. 1076 (E.D. Va. 1994).

9. Plaintiff's action against Defendant is, therefore, time-barred under applicable law in this jurisdiction.

In further support of this plea of the statute of limitations, Defendant shall submit for the Court's consideration a Memorandum of Points and Authorities in Support of Defendant's Plea, which upon filing shall be incorporated herein.

WHEREFORE, Defendant respectfully prays that this Court dismiss the Motion for Judgment against Defendant with prejudice and award Defendant costs and attorney's fees incurred in connection with this action.

Respectfully submitted,

THOMAS E. HORTON
Defendant, by counsel

Jon M. Lippard (VSB No. 31748)
JON M. LIPPARD, P.C.
First Floor
314 Commerce Street
Alexandria, Virginia 22314

Counsel for Defendant
Thomas E. Horton

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of foregoing Plea of the Statute of Limitations was mailed first-class, postage prepaid, on this 19th day of October, 1995, to the following:

Robert M. Cary, Esquire
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005

Sean C. E. McDonough, Esquire
GRAD, LOGAN & KLEWANS
112 N. Columbus St.
P.O. Box 1417-A44
Alexandria, Virginia 22313

/s/ Jon M. Lippard